



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights

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P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

SEP 12 2008

In Reply Refer to:
331:WT:401 cert

Stanley G. Sylva, Forest Supervisor
US Modoc National Forest
800 West 12th Street
Alturas, CA 96101

Dear Mr. Sylva:

FOUR MILE AND WEED VALLEY RESERVOIR WETLANDS RESTORATION PROJECT IN MODOC COUNTY

On August 4, 2008, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) received US Forest Service, Modoc National Forest (USFS) certified letter No. 7008 1140 0002 8675 8065 (August 4 letter). The USFS contends that the final payment of \$6,465.13 for costs incurred by the Division in processing the water quality certification under section 401 of the Clean Water Act (401 WQC) is not warranted pursuant to California Code of Regulations, title 23, section 3833, subdivision (b)(4) because the revised application was submitted within 12 months of the denial without prejudice, procedural problems were corrected, and there was no significant change in the project. In addition, the USFS contends that it is not necessary to appropriate water to the Four Mile and Weed Valley storage facilities because the US Bureau of Reclamation (USBR) has a pre-1914 appropriation right and the two federal agencies have entered into a Memorandum of Understanding (MOU) for USFS to proceed with the restoration project. The USFS positions regarding payment due for 401 WQC processing and the need for the water right application are not in accord with the requirements of the law.

Processing Costs for 401 Water Quality Certification

California Code of Regulations, title 23, section 3833, subdivision (b)(4) does not exempt the applicant from paying the reasonable cost of processing the 401 WQC application, but rather states that no fee additional to any unpaid fee need accompany the revised application. This does not mean that reasonable costs do not continue to accrue as contemplated in section 3833, subdivision (b)(2)(B).

The amount of \$6,465.13 is the Division's fee for servicing the USFS request for a 401 WQC. This amount does not include costs for internal legal counsel. These costs may be incorporated into the Division costs for processing the 401 WQC if continued counsel is required due to USFS's refusal to remit payment.

California Environmental Protection Agency

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File S-004910

Water Rights Application

On December 21, 2007 the Executive Director of the State Water Board denied without prejudice the July 3, 2007 application for 401 WQC, in part because the USFS had not provided evidence of a valid water right for the Four Mile and Weed Valley storage facilities. The USFS asserts in the August 4 letter "that no appropriative water is required for this project as the USBR already holds a pre-December 19, 1914 appropriative right dated April 9, 1910" and that "this right includes tributaries in the proposed project area which are tributary to Willow Creek." The Four Mile Reservoirs were constructed after 1914 and the purpose of water use under the federal reservation filed by the USFS was for stockwatering. There is no water right documentation filed by the USFS on Weed Valley Reservoir. Furthermore, the USFS cannot claim a federal reserved water right for wildlife enhancement because this was not a primary use declared for US forest land. (*In re Determination of Rights of Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448.) These reasons were provided as the basis for the denial in the December 12, 2007 Division Memorandum (enclosed) that accompanied the denial letter.

Division staff review of information provided in the August 2008 USFS letter also finds the following:

1. The 1984 MOU and subsequent MOU's between USBR and USFS are viewed as USFS operational or bypass agreements that protect the USBR water supply to Clear Lake Reservoir and do not constitute a water right.
2. The Division has no record that the USBR transferred any portion of its pre-1914 entitlement to the USFS.
3. There is no delivery system from Clear Lake Reservoir to the upstream USFS facilities, regardless of any contracts to deliver water between the USBR and the USFS.
4. The USBR does not have diversion structures upstream of Clear Lake Reservoir, and therefore does not have control of the USFS storage facilities.
5. From 1910 to 2002, the original Clear Lake Reservoir dam was structurally unstable, and the USBR was unable to maximize storage at the high water level. For this reason, the full appropriation amount of 527,000 acre-feet annually, as claimed under pre-1914 Statement of Water Diversion and Use Number S004910, may have been partially forfeited for nonuse during the 92 years leading up to reconstruction of the dam in 2002.¹

Conclusion

USFS indicates in its answer to Question 3d of the revised application for a 401 WQC that there may be a need to file a water right application for the Four Mile and Weed Valley facilities. Division staff agrees that an application to appropriate water is needed, and further concludes that because water stored in the Four Mile and Weed Valley facilities has not been appropriated

¹ Upper Lost River and Clear Lake Reservoir Watershed – Total Maximum Daily Load Analysis Report Water Temperature and Nutrients, California Regional Water Quality Control Board, North Coast Region, December 27, 2004, page 9.

SEP 12 2008

pursuant to state law, such appropriation is a trespass against the State of California. An application to appropriate water for storage in the Four Mile and Weed Valley Reservoirs must be submitted to the Division.

The July 2007 application was denied without prejudice because the USFS had not submitted an application to appropriate water stored in the Four Mile and Weed Valley Reservoirs. The USFS's revised 401 WQC did not correct the procedural problem. Therefore, the initial \$1000 deposit that accompanied the revised application was appropriate. The remaining balance of \$6,465.13 incurred for processing the revised 401 WQC application, as previously identified in the Division's June 24, 2008 certified letter, is owed to the State Water Board.

If you have any questions regarding these matters, please contact Camilla Williams (916) 327-4807 or at CKWilliams@waterboards.ca.gov, or Whalen Toy at (916) 341-5408 or at WToy@waterboards.ca.gov.

Sincerely,

ORIGINAL SIGNED BY:

Les Grober, Manager
Hearings and Special Programs Section

Enclosure

cc: Barry Hill
USDA – Forest Service
Pacific Southwest Region
1323 Club Drive
Vallejo, CA 94592

Jim Irvin, District Ranger
US Modoc National Forest
800 West 12th Street
Alturas, CA 96101

Patty Buettner
US Modoc National Forest
PO Box 367
Tulelake, CA 96134

John Ranlett
Ducks Unlimited
Western Regional Office
3074 Gold Canal Drive
Rancho Cordova, CA 95670

bcc: Jim Kassel, Les Grober, Matt Bullock (OCC)

WToy:ds August 18-19, 26, 28, September 5, and September 9-11, 2008

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STATE OF CALIFORNIA
THE RESOURCES AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
STATEMENT OF WATER DIVERSION AND USE

S4910

This statement should be typewritten or legibly written in ink.

- A. Name of person diverting water United States Bureau of Reclamation
Address 2800 Cottage Way, Sacramento, California 95825
- B. Name of body of water at point of diversion Lost River
Tributary to Tule Lake
- C. Place of diversion NW 1/4 SE 1/4 Section 8 Township 47 N., Range 8 E., MD B&M,
Modoc County, or locate it on sketch of section grid on reverse side with regard to section lines or prominent local landmarks.

D. Name of works Clear Lake Dam and Reservoir 1-032-00-000

E. Capacity of diversion works --
Capacity of storage reservoir 527,000 acre-feet
State quantity of water used each month in gallons or acre-feet

Year	Quantities in thousands of acre-feet											Total Annual	
	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.		Dec.
1966	2.1	2.1	3.1	10.4	15.8	19.8	26.0	24.4	11.5	6.7	3.4	2.0	127.3

If monthly and annual use are not known, check months in which water was used. State extent of use in units, such as acres of each crop irrigated, average number of persons served, number of stock watered, etc. Water stored in Clear Lake Reservoir together with water stored in other project facilities was utilized within the boundaries of the Klamath Project, Oregon-California

Maximum annual water use in recent years (since 1950) 234,010 acre-feet
Minimum annual water use in recent years (since 1950) 95,890 acre-feet
Type of diversion facility: gravity X, pump computed
Method of measurement/weir flume, electric power meter water meter, estimate estimate

F. Purpose of use (what water is being used for) Irrigation and flood control

G. General description or location of place of use (use sketch of section grid on reverse side if you desire) Within the Klamath Project, Oregon-California

H. Year of first use as nearly as known 1909

I. Name of person filing statement Regional Director, Region 2
Position Regional Director Organization United States Bureau of Reclamation
Address 2800 Cottage Way, Sacramento, California 95825

I certify that the foregoing statements are true and correct to the best of my knowledge and belief.

Date signed AUG 27 1969

Signature

E. F. Sullivan
E. F. Sullivan
Acting Regional Director

See Instructions on Reverse Side

(916) 324-5739

SEPTEMBER 09 1988

In Reply Refer
to:331:WT:S4910

U. S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Gentlemen:

WATER RIGHT APPLICATION - DRY PRAIRIE CREEK IN
KLAMATH COUNTY, OREGON

For your information, we are enclosing A Notice of
Application to Appropriate Water from Oregon which may have
impact on right claimed under Statement 4910.

Sincerely,

ORIGINAL SIGNED BY

Whalen Toy
Sanitary Engineering Associate
Application Unit #1

Enclosure
WTOY:knox

9/9/88

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